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No. 97-252

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

THOMAS R. HUTCHINSON, Personal Representative of the Estate of Robert W. Hutchinson, deceased,

Petitioner,

vs.

RICHARD B. PFEIL and MARY JOAN PFEIL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

While framed in terms of a deprivation of due process, the Petition for Writ of Certiorari ("Petition") is in reality a request that this court reconsider the District Court's substantive determination that the doctrine of laches bars the Petitioner, Thomas R. Hutchinson, from recovering on an eighty year old claim. The Petitioner offers no support for his contention that he was denied a fair opportunity to be heard, nor does he have any evidence to support his claim that the United States Tenth Circuit Court of Appeals failed to consider his arguments. Stripped down to its bare essence, Petitioner's request for a writ of certiorari can be stated as follows: "Because the Court ruled against me, it must not have considered my arguments."

In fact, both the United States District Court for the Northern District of Oklahoma and the Tenth Circuit Court of Appeals fully and fairly considered the arguments set forth by both litigants and properly determined that the Petitioner was barred from pursuing his claim under the doctrine of laches. This Court should deny the Petition.

STATEMENT OF THE CASE

On November 30, 1992, Petitioner filed his Complaint seeking to recover a one-third (1/3) interest in a painting titled "Summer Hillside" that was painted by Theodore Robinson. Petitioner, who is a distant descendent of the painter's brother, asserted that the painting was sold by the painter's sister-in-law in 1912 to William Macbeth (80 years before the filing of the Complaint) without full authority to do so. Although "Summer Hillside" was sold several times thereafter to unrelated persons, Plaintiff argued that his right to a one-third (1/3), undivided interest in the painting remained with the Robinson family and eventually was acquired by him through a series of testate and intestate successions.

The Respondents, Richard and Mary Jo Pfeil, purchased "Summer Hillside" through an art auction in 1986. Petitioner, who until now never asserted his interest in "Summer Hillside," claims title to the painting. In response to the Petitioner's claim, the Respondents asserted several affirmative defenses, including defenses based upon the doctrine of laches, statute of limitations, and collateral estoppel. The Respondents moved for summary judgment on February 28, 1995.

By Judgment and Order [Appendix ("App.") C to Petition] dated August 4, 1995, Respondents' Motion for Summary Judgment was granted based upon the doctrine of laches and the statute of limitations. Thereafter, Petitioner filed his Motion to Alter Order and Judgment requesting the Court to set aside the Order and Judgment and rule in his favor. By Order dated December 22, 1996, the District Court denied the Petitioner's Motion to Alter Order and Judgment (attached hereto as App. A).

The Petitioner appealed the District Court's Judgment to the United States Tenth Circuit Court of Appeals. The Tenth Circuit affirmed the Order and Judgment of the District Court (App. A to Petition). The Petitioner twice sought reversal of the Judgment — first, by filing a Petition for Rehearing and second, by filing with the Tenth Circuit a Petition for Writ of Mandamus. The Tenth Circuit denied both requests.

By filing a Petition for Writ of Certiorari and a Petition for Writ of Mandamus[1] with the United States Supreme Court, the

1. The Petition for Writ of Mandamus is largely duplicative of the Petition. Because of the repetitiveness of the arguments and the inappropriateness of such an extraordinary writ, [28 U.S.C. § 1651(a); *Kerr v. United States District Court*, 426 U.S. 394, 402, 48 L. Ed. 2d 725, 732, 96 S. Ct. 2119 (1976) ("only exceptional circumstances amounting to a judicial

(Cont'd)

Petitioner now requests this Court to review and reverse the Tenth Circuit's Opinion.

REASONS FOR DENYING THE WRIT

I.

THE TENTH CIRCUIT COURT OF APPEALS REACHED ITS OPINION ONLY AFTER THE PETITIONER WAS GRANTED HIS FULL RIGHT TO DUE PROCESS.

The Due Process clause of the Fifth Amendment of the United States Constitution gives each litigant the right to notice and an opportunity for a hearing appropriate to the nature of the case. *Cleveland Brd. of Educ. v. Loudermill*, 470 U.S. 533, 542, 84 L. Ed. 2d 494, 503, 103 S. Ct. 1487 (1985); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 94 L. Ed. 865, 70 S. Ct. 652 (1950). The Petitioner has been given that right.

Both the United States District Court and the Tenth Circuit Court of Appeals fully, fairly, and repeatedly heard the Petitioner's claim. In fact, the record below shows that the Petitioner took advantage of every conceivable opportunity to present his case first to the District Court and then to the Tenth Circuit.

In response to the Respondents' Motion for Summary Judgment, Petitioner filed a 45 page brief. After the Motion had

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'usurpation of power' will justify the invocation of this extraordinary remedy")], Respondents have elected not to respond to the Petition for Writ of Mandamus. To the extent this Court feels a response to the Petition for Writ of Mandamus is warranted, Respondents request this Court to consider the arguments presented herein as the response.

been fully briefed, the District Court set the Motion for oral argument. Petitioner's counsel appeared and argued his position.[2]

On August 4, 1995, the District Court entered its Judgment and Order granting Respondents' Motion. As can be seen from the Order (App. C to Petition), the Court carefully analyzed the legal arguments of laches and statute of limitations asserted by the Respondents and entered its Judgment based upon each of those arguments.

Thereafter, the Petitioner filed his Motion to Alter Order and Judgment accompanied by a 25 page brief. Respondents filed their response brief and Petitioner filed an 11 page reply brief. By Order filed December 22, 1996, the District Court again considered the Petitioner's arguments and entered its order addressing, but rejecting, Petitioner's Motion (App. A hereto).

Petitioner appealed the Judgment and denial of his Motion to Alter Order and Judgment to the Tenth Circuit Court of Appeals. The appeal was briefed and the Tenth Circuit granted Petitioner's request for oral argument. In a reported opinion, the Tenth Circuit affirmed the District Court's judgment based upon the common law doctrine of laches [*Hutchinson v. Pfeil*, 105 F.3d 562 (10th Cir. 1997)].

The Petitioner sought review of this decision by filing his Petition for Rehearing. After the Tenth Circuit denied the Petition, the Petitioner again sought review of the Opinion by filing with the Tenth Circuit a Petition for Writ of Mandamus. The appellate court properly construed the pleading as a second petition for rehearing and therefore denied it.

Respondents have no disagreement with the cases cited by

2. Transcript of the argument includes 16 pages of argument presented by Petitioner's counsel.

the Petitioner for the propositions that "the opportunity to be heard is an essential requisite of due process of law," *Richards v. Jefferson County, Ala*, 116 S. Ct. 1761, 1765 n.4, 135 L. Ed. 2d 76, 85 n.4 (1996), and due process "requires that the decisionmaker actually consider the evidence and argument that a party presents." *de la Llana-Castellon v. Immigration and Naturalization Serv.*, 16 F.3d 1093, 1096 (10th Cir. 1994). However, Petitioner has no evidence to support his contention that he has been denied his right to due process. Petitioner's argument is based not on any factual showing of procedural deficiencies, but upon unsubstantiated conclusions. For example, Petitioner asserts on page 7 of his Petition that "Hutchinson was denied procedural 'due process' when the panel held that his partition action was barred by laches without considering arguments and evidence he presented . . ." Except for his contention that the Court reached the wrong conclusion, Petitioner does not explain how he determined that the panel did not consider his arguments.

Similarly, on page 10 of his Petition, Petitioner claims that the hearing afforded him was not "appropriate to the nature of the case." While his argument is superficially designed to fall within the parameters of this Court's holding in *Cleveland Brd. of Educ. v. Loudermill*, 470 U.S. at 542 (due process requires an opportunity for a hearing appropriate to the case), the Petitioner's claim that he was denied an appropriate hearing is unsupportable. Procedurally, he was granted the only "hearing" available to an appellant — briefing and oral argument. If such a procedure constitutes a deprivation of due process, then the entire Federal Rules of Appellate Procedure would come under attack.

If, on the other hand, it is the Petitioner's contention that the Tenth Circuit deprived him of his due process rights by affirming the Judgment based upon the affirmative defense of laches, without otherwise considering the merits of his case,

the Petitioner is wrong.[3] Courts routinely dispose of stale claims without addressing the underlying merits. Such conduct, justifiable considering the nature of a laches defense, does not violate any due process rights. As recognized in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 71 L. Ed. 2d 265, 279, 102 S. Ct. 1148 (1982), "the State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statute of limitations, . . . or, in an appropriate case, filing fees." *See Gonzalez-Julio v. Immigration and Naturalization Serv.*, 34 F.3d 820, 823 (9th Cir. 1994) (procedural requirements, including statute of limitations and reasonable evidentiary rules may be imposed on the right to adjudicate).

The Petitioner's denial of due process contention can be reduced to the simple proposition that the Court must not have considered his arguments because it ruled against him. Yet the record shows the appellate court reached its opinion only after Petitioner was given fair notice and repeated opportunities to voice his opposition to the Respondents' affirmative defenses. The fact that the Court ruled against the Petitioner does not support his contention that he was not afforded a fair hearing.

II.

THE TENTH CIRCUIT PROPERLY CONSIDERED THE PETITION FOR REHEARING AND PETITION FOR WRIT OF MANDAMUS.

In addition to claiming a general denial of his right to due process during the appellate procedure, Petitioner independently

3. Petitioner also attacks the Tenth Circuit's decision not to consider the Respondents' other affirmative defenses after it had decided that the Petitioner's claim was barred under the doctrine of laches. Obviously, once the Tenth Circuit had found Respondents' summary judgment motion to be supportable under one theory, it had no need to consider the others. Its ruling on the defenses would not, under any circumstances, have changed the outcome.

attacks the Tenth Circuit's handling of his Petition for Rehearing (Petition, p. 18) and Petition for Writ of Mandamus.[4] Again, Petitioner relies exclusively on the fact that the Court ruled against him. Petitioner admits that he has no evidence to support his position that his arguments were not considered by the Appellate Court when he states as follows:

> Whether the panel found the contentions in Hutchinson's Petition for Rehearing legally insufficient is unknown because of the summary denial of his Petition. Whether one, two, or all three members of the panel actually considered his contentions before the Petition was denied is also an unanswered question. Whether the full panel must consider every such Petition is another matter that should be encompassed by any statement of "fundamental requirements" promulgated by this Court.

Petition, p. 22.

Petitioner apparently wants this Court to order each appellate court panel to write a formal opinion responding to

4. Petitioner filed a Petition for Writ of Mandamus to the Tenth Circuit Court of Appeal *en banc* seeking to compel the three judge panel to reconsider his failed arguments. As authority for such an unconventional filing, Petitioner cites dictum contained in *In re Sealed Cases*, 794 F.2d 749, 750, n.1 (D.C. Cir. 1986). In that case the Court of Appeals for the District of Columbia Circuit addressed issues specifically relating to application of the provisions of 28 U.S.C. § 1826, regarding incarceration of recalcitrant witnesses. The dictum cited by Petitioner relates only to the possibility that the remedy of mandamus may be used when the appeal is not resolved within the thirty day statutory period. This case neither suggests nor infers that the extraordinary relief of mandamus is available as a means for a circuit court of appeals *en banc* to compel its own panel to reverse its opinion.

each appeal or petition for a writ no matter how baseless the request. If the same standards were applied to this Court, it would be required to prepare a formal opinion stating the reasons for the denial of each petition for certiorari or mandamus.[5] Obviously, no due process standard requires such treatment by the appellate court.

Lacking any facts to support his claim that his Petition for Rehearing was not considered by the Tenth Circuit, Petitioner's argument is once again reduced to the proposition that his claim must not have been considered because he lost. This identical argument was raised by the Petitioner to the Tenth Circuit when he argued that the District Court Judge should have recused himself for failing to properly consider the Petitioner's arguments. In response to the Petitioner's request, the Tenth Circuit stated as follows:

> The district judge did not ignore Plaintiff's arguments — he found them insufficient. We likewise find that Mr. Hutchinson's argument is without merit . . .

App. A to Petition, p. 6a.

This Court should similarly recognize that the Tenth Circuit did not ignore the Petitioner's arguments, it found them insufficient. For that reason, his Petition should be denied.

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5. United States Supreme Court Rule 16 expressly provides that an "order may be a summary disposition on the merits."

III.

THE COURT SHOULD NOT GRANT CERTIORARI FOR THE PURPOSE OF DECIDING THIS DISPUTE BASED UPON STATE LAW.

The substantive issue that the Petitioner requests this Court to review or reopen is whether the Tenth Circuit erred in affirming the District Court's determination that the Petitioner's claim was barred under the doctrine of laches. To justify the granting of certiorari, the Court should determine, in addition to finding a denial of due process, that there is a compelling reason to review the appellate court's conclusion that the Petitioner's eighty year old claim was barred by the doctrine of laches. Pursuant to United States Supreme Court Rule 10 "a petition for writ of certiorari will be granted only for compelling reasons.".

As a general rule, this Court does not grant petitions for writ of certiorari to review an appellate court's application of state law. *See Haring v. Prosise*, 462 U.S. 306, n.8, 76 L. Ed. 2d 595, 103 S. Ct. 2368 (1983) ("it is our practice to accept a reasonable construction of state law by the Court of Appeals 'even if an examination of the state-law issue without such guidance might have justified a different conclusion' "); *Bishop v. Wood*, 426 U.S. 341, 346, 48 L. Ed. 2d 684, 691, 96 S. Ct. 2074 (1976); *Propper v. Clark*, 337 U.S. 472, 486-487, 93 L. Ed. 1480, 69 S. Ct. 1333 (1949) (this Court is hesitant to overrule decisions made by federal courts as to state law unless the conclusions are unreasonable). [*See* United States Supreme Court Rule 10 (a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law).]

Exceptions to this rule have been made only in cases of substantial importance or controversy. The present case does not warrant such an exception. Whether the Petitioner's claim

can be characterized as one in partition or one in replevin, the dispute is neither complex nor one of significant precedential value. Petitioner claims partial ownership of a painting as a result of an allegedly unauthorized sale that occurred in 1912. Based upon the undisputed facts and by application of the common law doctrine of laches, the Tenth Circuit upheld Respondents' argument that the claim was barred by laches. The court relied upon Oklahoma case law in reaching its opinion (*see* App. A to Petition), but it could have applied the common law from just about any state in the country. "Whether a claim is barred by laches much be determined by the facts and circumstances in each case and according to right and justice." [App. A. to Petition, p. 3a, *citing Preston v. Berry*, 234 P.2d 417, 422 (Okla. 1951).] Thousands of courts have applied this same principle to the facts before them in determining whether claims should be barred. The doctrine of laches is not in controversy, and the review of this case will have no impact upon that doctrine. There is no compelling reason to justify the granting of certiorari. Accordingly, this Court should allow the Tenth Circuit's application of state law to remain without further review.

IV.

THE APPELLATE COURT FOLLOWED PROPER PROCEDURE AND CORRECTLY APPLIED STATE LAW WHEN IT AFFIRMED THE DISTRICT COURT'S JUDGMENT.

Below the surface of Petitioner's repeated claims of denial of due process is a garden variety dispute as to whether the Petitioner's claim is barred by the doctrine of laches. If this Court were to consider the substance of that dispute it would find that the Tenth Circuit correctly applied state law in reaching its conclusion.

Respondents argued in the courts below that the inexcusable delay of eighty years in instituting suit and the resulting prejudice to the Respondents barred the Petitioner from pursuing his claim. *See Alexander v. Phillips Petroleum Company*, 130 F.2d 593 (10th Cir. 1942); *Armstrong v. Maple Leaf Apartments, Ltd.*, 436 F. Supp. 1125, 1149 (N.D. Okla. 1977), *aff'd in part*, 622 F.2d 466 (10th Cir. 1979), *cert. denied*, 449 U.S. 901 (1980). Based upon the undisputed facts that the Petitioner's predecessors had notice that the painting, "Summer Hillside," was no longer in their possession and that they took no action to protect their rights, the Court determined the Petitioner and his predecessors had unreasonably delayed in asserting their claim. *Sautbien v. Keller*, 423 P.2d 447, 451 (Okla. 1967) ("equity cannot . . . assist Plaintiffs to escape from circumstances created by fault of their privies"). (*See* App. A to Petition, p. 4a.) The Court further found that because of faded memories, witnesses who could either not be located or were deceased, and the inaccessibility of documents, the Respondents had been substantially prejudiced by the Petitioner's delay. It therefore barred the Petitioner from pursuing this action.

Petitioner failed to show that the equitable doctrine of laches should not be applied to the facts in this case. The main Oklahoma case cited by the Petitioner, in fact, supports the proposition that the Respondents' claim was barred not only by laches but also by the statute of limitations. *See Bevan v. Shelton*, 469 P.2d 245 (Okla. 1970) (statute of limitations begins to run when a co-tenant "ousts" the other co-tenant from possession of property by conveying the same to a third party). Because the Petitioner's predecessor-in-interest was ousted from "Summer Hillside" in 1912, any claim for recovery of the painting would have begun at that time. Under either defense (laches or statute of limitations), the claim was stale long before Petitioner filed it in 1992. Therefore, the Tenth Circuit properly affirmed the District Court's decision to bar the Petitioner's claim under the doctrine of laches.

CONCLUSION

For the reasons set forth above, this Court should deny the Petition.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA FILED DECEMBER 22, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 92-C-1088-E

THOMAS R. HUTCHINSON, as Personal Representative of the Estate of Robert W. Hutchinson, deceased,

Plaintiff,

vs.

RICHARD PFEIL and MARY JO PFEIL,

Defendants.

ORDER

Now before the Court is the Motion to Alter Order and Judgment (Docket # 184) of the Plaintiff Thomas R. Hutchinson (Hutchinson).

Hutchinson brings this action for partition and an accounting against his cotenants, claiming that he has an undivided one-third interest in and title to the painting "Summer Hillside" by Theodore Robinson. Defendants filed a motion for summary judgment, asserting that Plaintiff's claim is based on speculation and guesswork, and is barred by laches, the statute of limitations, or the doctrine of collateral estoppel. Defendants also urged that plaintiffs were equitably estopped from claiming an interest in "Summer Hillside." The Court granted the Motion for Summary Judgment, finding that Plaintiff's claims were barred by the

statute of limitations and laches. Plaintiff filed this Motion to Alter, claiming that numerous rulings call into question the Court's impartiality; that the Court applied an incorrect standard in determining the motion for summary judgment; and that the Court improperly applied the substantive law in making its ruling.

The Court will first address Plaintiff's assertion that the Court should recuse itself. In making this request, plaintiff complains that the Court was not neutral as is required by due process when it 1) refused to lift a pre-filing screening requirement; 2) stayed on discovery pending determination of the defendants' motion for summary judgment and 3) concluded in the judgment that an award of fees was proper before plaintiff had an opportunity to be heard on the matter. On these perceived errors, plaintiff leaps to the conclusion that the Court did not promote participation in the decision making process, and therefore is not neutral.

In determining the necessity for recusal, "the judge's actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue." *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993). The test is "whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality. . . . In applying the test, the initial inquiry is whether a reasonable factual basis exists for calling the judge's impartiality into question." *Id.* In applying this test to plaintiff's arguments, it is important to note that the pre-filing screening requirement was placed on ***all parties*** after the court had been barraged with pleadings from both sides, most of which were requests for sanctions. Moreover, the stay was placed on discovery in order to determine whether the decision on the substantive motions would put an end to this lengthy and

complex litigation, and was entered at a conference where both sides were present and given an opportunity to be heard on the issue. Lastly, the Judgment merely stated that "Costs and attorneys fees ***may*** be awarded upon proper application." Thus there is no reasonable factual basis for calling the Court's impartiality into question, and certainly no basis for asserting that the Court determined that plaintiff was "stuck", or that the Court made its decision without reading Plaintiff's briefs or taking all of the evidence into consideration.

Having decided that neither transfer of this case nor recusal is warranted, the Court now turns to the merits of Plaintiffs' motion. Plaintiff's first claim of error is that the Court relied on an improper standard in deciding the motion for summary judgment. Plaintiff takes issue with language in the Court's order quoted from *Celotex Corporation v. Catrett*, 477 U.S. 316, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), arguing that in relying on this language, the Court committed a "clear error of law." Plaintiff correctly points out that defendants bear the burden of proof on the defenses raised in the motion for summary judgment, and incorrectly asserts that, by quoting specific language from *Celotex*, the Court placed the burden of proof on plaintiff. Nothing in the order bears out this assertion, and the analysis in the Order makes it clear that the Court determined that there was no genuine issue of material fact, and, as a matter of law, defendants were entitled to summary judgment.

Plaintiff also argues that the Court incorrectly applied the substantive law in this case. In making this argument, plaintiff merely re-hashes previous arguments on these issues. In reviewing the record in this matter, as well as the substantive law, the Court finds no basis on which to reverse or alter its previous ruling.

Appendix A

Plaintiff's Motion to Alter Order and Judgment (Docket #184) is denied.

Dated, this 21st day of December, 1995.

s/ James O. Ellison
JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT